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No. 779

IN THE

Supreme Court of the United States

CARL M. FIELD, as Trustee in Bankruptcy in the Estate of GIANT OUTLET MARKET, INC., Bankrupt,

Petitioner,

vs.

BANKERS TRUST COMPANY and THE FIRST NATIONAL CITY BANK OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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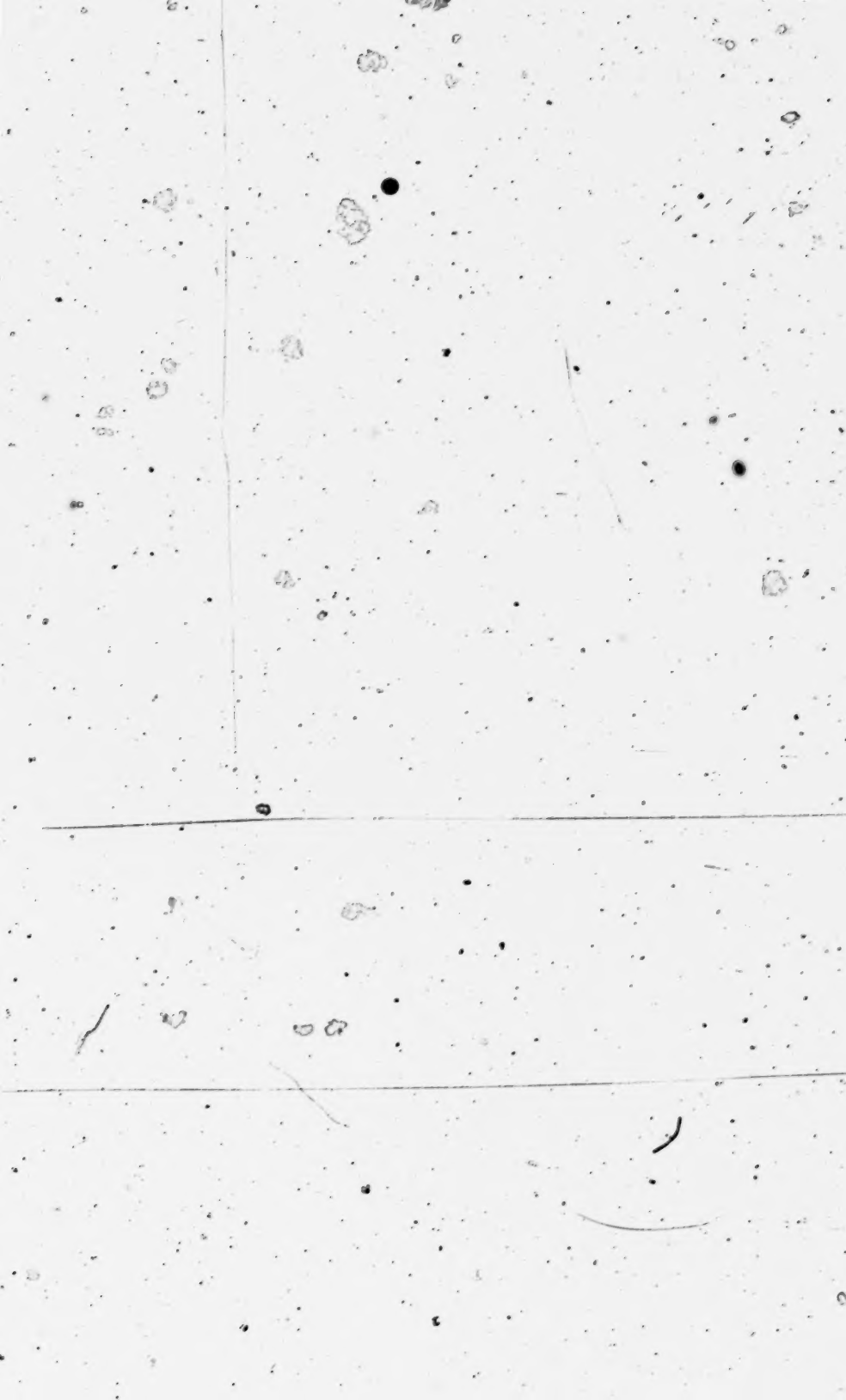

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IN THE

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CARL M. FIELD, as Trustee in Bankruptcy, in the Estate of GIANT OUTLET MARKET, INC., Bankrupt,

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on November 8, 1961, which affirmed a summary judgment entered in the United States District Court for the Eastern District of New York, on the 16th day of June, 1960, dismissing petitioner's complaint against the respondents herein (First, Second and Sixth causes of action; R. pp. 2a, 3a, 5a).

Opinion Below

The opinion of the Circuit Court of Appeals for the Second Circuit was reported in 296 Fed. (2d) 109, and is reprinted as an appendix hereto.

Jurisdiction

The jurisdiction of the United States District Court is based on the provisions of the Act of Congress relating to Bankruptcy; and the jurisdiction of this Court is invoked under Title 28 of the United States Code, Section 1254 (1).

On appeal, the judgment of the District Court was affirmed by the United States Court of Appeals for the Second Circuit on November 8, 1961; a timely petition for rehearing was denied by the Court of Appeals on December 7, 1961.

Questions Presented

The questions sought to be reviewed before this Court are: Did the United States Court of Appeals for the Second Circuit decide important questions of state law, namely, of the State of New York, in conflict with the applicable and well established law as pronounced by the courts of the said state, to wit:

(a) May a trustee in bankruptcy of a corporation recover from the transferee corporate funds diverted from the corporation by its officer for his own use and benefit although the corporation may not be insolvent at such time;

(b) Can the diversion of such corporate funds be ratified by the corporation where, in fact, the transfers constituted a reduction of the capital stock of the corporation, in violation of Section 58 of the New York Stock Corporation Law;

(c) Under Section 95 of the New York Negotiable Instrument Law, is a depository bank protected from liability as a joint tort-feasor in the conversion of corporate funds where the corporation had filed a resolution with

such bank, absolving it from any inquiry as regards the payments from its corporate account.

It is respectfully submitted that on each of these three important questions of corporate and banking practice in the State of New York, the United States Circuit Court of Appeals for the Second Circuit has come to conclusions contrary to the law of the State of New York.

Statement

This action was commenced in the United States District Court for the Eastern District of New York by the trustee in bankruptcy of Giant Outlet Market, Inc., a corporation organized under the laws of the State of New York. The trustee sought to recover moneys transferred by one Martin Lew, an officer and the sole stockholder of the bankrupt corporation, to several payees to whom the corporation was *not* indebted. It is the trustee's contention that the corporate funds were thereby misappropriated by said Martin Lew for his own use and benefit. At the time the action was commenced, Martin Lew had disappeared, and service of process could not be effected upon him. The other defendants in the action are the payees, and hence the recipients, of corporate moneys; in addition the trustee seeks to hold the defendant Bankers Trust Company liable as a joint tort-feasor with Martin Lew, for its part in the diversion of the corporate funds, on the ground that the said bank paid the checks presented to it with knowledge or notice of the improper use of these corporate funds.

The defendant Bankers Trust Company moved for summary judgment, with respect to the three causes of action alleged against it. The trustee cross-moved for summary judgment on the first and second causes of action against

the defendants Bankers Trust Company and against The First National City Bank of New York, on the second cause of action. It was the trustee's position, with respect to the sixth cause of action alleged in the complaint, that triable issues were presented which could not be disposed of by summary judgment.

The following excerpt from the opinion of the District Court (R. 15a-16a) sets forth the facts upon which the trustee bases his claims against the two defendant banks (The United States Court of Appeals in its opinion accepted these facts):

> "Giant Outlet Market, Inc., the bankrupt corporation, operated a farmers market in leased premises at Rockaway Avenue in Brooklyn, New York. Martin Lew was the president and sole stockholder of the corporation. In December 1956, the market burned down. Thereafter, the corporation received about $40,000 on its fire insurance policies, which it deposited in the corporate account maintained with Bankers Trust Company ("Bankers"). At the time the account was opened in December 1955, the corporation filed with Bankers a corporate resolution authorizing Martin Lew as president to transact all corporate business, including the signing and endorsing of all negotiable instruments, and further authorizing Bankers to pay such instruments when so signed.
>
> During July 1957, there occurred the following incidents that constitute the first of the trustee's three claims against the depository bank, Bankers. Lew presented at the appropriate office of Bankers four checks drawn by the corporation and signed by himself as president, payable to Bankers, and received in their stead, upon payment of a one dollar fee, four cashier's checks in equivalent amounts payable to four different individuals, two of whom had the last name of "Lew". The checks were for amounts ranging from

$1,000 to $2,439.06, and totaled $7,439.06. However, the corporation owed nothing to these four payees. Thereafter, Bankers debited the corporate account in this amount.

The transaction which is the basis of the trustee's second claim against both banks took this form: On July 18, 1957, a check for $1,045, drawn on Bankers by the corporation and signed by Lew as president was sent to The First National City Bank of New York ("FNCB") in part payment of a $6,000 loan that FNCB had made to Lew personally. The check bore on its reverse side Lew's own notation that it was to be credited to his account at FNCB. After normal bank collection procedures, Bankers debited the corporation account.

The trustee's third claim is based on these facts: On August 8, 1957, Lew cashed at Bankers a check drawn by the corporation, by Lew, as president, and made payable to himself. The check was in the amount of $16,433.30 and had the practical effect of closing out the account. Thereafter, Lew used this money for his own purposes.

The involuntary petition in bankruptcy was filed January 23, 1958 and the corporation was adjudged a bankrupt February 10, 1958. Creditors have filed claims totalling $4,443.12, and time has elapsed for these, or any other, creditors to file any further claims, except for the United States which may still file a tax claim for $4,004.54.

The District Court granted the defendant Bank's motion for summary judgment and denied the trustee's cross-motion. It directed summary judgment dismissing the first, second and sixth causes of action. On appeal, the United States Court of Appeals for the Second Circuit affirmed.

Reasons for Granting the Writ

Point One:

The District Court correctly stated the law:

> "A corporate officer who uses corporate funds for his own purposes may be liable for conversion to the corporation and in bankruptcy to the trustee. Since the officer has no title to the property, transferees of the officer may be similarly liable."

However, the District Court concluded (erroneously, it is submitted) that the personal use of corporate funds by Martin Lew was *ratified* by the *corporation*, through Martin Lew himself acting as the corporation, since he was its only stockholder. Thus, the District Court seemingly concluded that the diversions of corporate funds by Martin Lew became authorized *corporate* acts. The trustee's only theory of recovery advanced in the complaint was that of the conversion of corporate funds. The District Court, however, in its opinion, discussed alternative grounds of recovery, none of which were urged by the trustee.

On the appeal to the Circuit Court of Appeals, the trustee contended that the theory of *ratification* was untenable because each of the transfers complained of was a reduction of the corporation's declared capital stock, in violation of Section 58 of the New York Stock Corporation Law, and that, therefore, the corporation could not *make* or *ratify* payments for the personal use of its officer. The Court of Appeals agreed with appellant's contention in that respect, namely, that moneys used by an officer in reduction of the corporation's capital stock could be recovered from the payee by the trustee, even where no insolvency results from such payment.

Cottrell v. *Albany Card & Paper Mfg. Co.*, 142 App. Div. 148;

Irving Trust Company v. *Gander*, 234 App. Div. 252.

There was also brought to the attention of the Court of Appeals the case of *Cowin* v. *Jonas et al.*, 293 N. Y. 838. There, the Court of Appeals of the State of New York allowed a trustee in reorganization to recover dividends paid out of capital and, moreover, held that *good faith* and *due care* on the part of the payee, and *ratification* by the stockholders, were *insufficient* to defeat the trustee's right to recover such payments.

The *Cowin* case is completely in point and controlling on the facts involved in this action. Nonetheless, the Court of Appeals, although paying lip service to the principle, failed to follow the established law as enunciated by the highest tribunal of the State of New York. It is respectfully submitted that the Court of Appeals, having rejected the theory of ratification of the transfers by the corporation, should have reversed and given judgment for the trustee. Although the Court of Appeals held that the corporation could not ratify payments in reduction of capital for non-corporate purposes, it chose to decide the appeal on a different ground, and one which the District Court had rejected, namely, that the defendant banks were protected from liability by reason of the corporate resolution filed with Bankers Trust Company. This question will be considered as the next point.

Point Two:

The defendant Bankers Trust Company sought to escape liability by reliance on a resolution filed with it by Martin Lew's corporation, pursuant to Section 95, New York Negotiable Instrument Law. The District Court rejected the claim to absolute protection of the depository bank based upon said resolution saying (R. 21a):

> "Section 95 of the New York Negotiable Instrument Law protects the holder-in-due-course status of a

drawee bank that honors a corporate check made payable to the corporate officer who drew it if the bank has on file a corporate resolution authorizing it to do so. Such a resolution was on file with Bankers. The trustee argues that section 95 only says that the fact that an officer presents a corporate check for payment 'shall not be sufficient' to put the bank on inquiry; that the facts in this case disclosed in addition: 1) prior improprieties on the part of Bankers, as evidenced by claim one and two; 2) a check for a large sum that closed out the account. The trustee concludes that the totality of these facts is sufficient to establish a prima facie case of notice to Bankers, so that adverse summary judgment would be improper. *While I agree with the trustee that the protection given banks by section 95 is not absolute*, I cannot agree that even facts that he hopes to prove at the trial would present an issue for the jury. . . ." (Emphasis supplied)

The Court of Appeals, on the other hand, departed from the opinion of the District Court, although this part thereof was not under attack on the appeal, and granted *absolute* protection to the paying bank upon the resolution on file, even where the conversion of corporate funds was patent and obvious. The Court of Appeals expressed itself in these words:

"' . . ., even if Bankers knew that Martin Lew was paying a personal debt to FNCB, the resolution permitted it to pay checks drawn by Martin Lew in payment of his personal obligations."

It is respectfully submitted that this view of the United States Court of Appeals is erroneous and runs contrary to the concept of corporate entity. It is axiomatic, and requires no citation of authority, that the funds of a corporation are set apart to be used for *corporate* purposes,

only, and are the primary (and only) fund to which creditors of the corporation can have recourse. If a corporation is permitted to pay out its funds for the personal purposes or needs of its officers, the entire concept of the corporate separateness is destroyed. If the decision of the Court of Appeals became accepted law, it would permit a party not a creditor of a corporation to retain corporate funds as against creditors of the corporation. This result, clearly, offends against the basic principles of the law of corporations.

The monetary value of this litigation is comparatively minor. However, the principle involved herein is of utmost significance in corporate practice. It merits review by the Supreme Court of the United States.

CONCLUSION

For the foregoing reasons, it is respectfully submitted, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

(West Key Number System)

Carl M. Field, as Trustee in Bankruptcy in the Estate of Giant Outlet Market, Inc., Bankrupt, Plaintiff-Appellant,

v.

Bankers Trust Company and First National City Bank of New York, Defendants-Appellees,

Martin Lew, Morrie Lew, Abraham Schneider and Household Finance Corporation, Defendants.

No. 32; Docket 26554.

United States Courts of Appeals Second Circuit.

Argued Sept. 27, 1961.

Decided Nov. 8, 1961.

Rehearsing Denied Dec. 7, 1961.

Action by a trustee in bankruptcy against two banks on the theory that the banks were chargeable with knowledge that misappropriations by the bankrupt corporation's president impaired its capital in violation of the New York Stock Corporation Law. From an adverse summary judgment of the United States District Court for the Eastern District of New York, Joseph C. Zavatt, J., the trustee appealed. The Court of Appeals, Lumbard, Chief Judge, held that, although the creditors were injured by the transactions, even though insolvency was not at that time caused, the banks were not required to ascertain whether the capital was impaired, in the absence of any knowledge by them of wrongdoing, and they were not liable.

Affirmed.

1. Corporations (key) 153

Stated capital which a corporation is required to retain serves as a buffer to absorb losses without impairing assets

necessary to satisfy all creditors, and creditors are harmed by any reduction of that buffer even though the particular distribution which impaired capital did not cause insolvency. Stock Corporation Law N.Y. § 58.

2. Corporations (key) 542(1)

Transferees with knowledge may be held liable for loss sustained by corporation or its creditors due to impairment of capital by distributing stated capital required to be retained by corporation. Stock Corporation Law N.Y. § 58.

3. Bankruptcy (key) 303(3)

Evidence showed that bank, being sued by a depositor's trustee in bankruptcy for disbursements from the corporation's account which impaired the corporation's capital under New York Stock Corporation Law, had no knowledge that transactions whereby corporate president withdrew funds for personal use impaired stated capital. Stock Corporation Law N.Y. § 58.

4. Corporations (key) 545(1)

Bank, which was authorized by a resolution of a corporated depositor to pay without inquiry checks drawn by president payable to himself and to ignore any notation on a check, was not put on inquiry as to possible impairment of stated capital by corporation's checks signed by president and payable to himself and others with same surname and in payment of his personal debt. Stock Corporation Law N.Y. § 58; Bankr.Act, § 70, subs. a(4), e, 11 U.S.C.A. § 110, subs. a(4), e.

5. Corporations (key) 545(1)

Bank which received corporate check signed by corporate president in payment of personal loan to president

had no greater obligation than bank on which check was drawn to ascertain whether corporation's stated capital was thereby impaired. Corporation Law, N.Y. § 58.

Jacob Oliner, New York City, for plaintiff-appellant.

Arnold A. Jaffe, New York City (Morris A. Mondschein and Moses & Singer, New York City, on the brief), for defendant-appellee Bankers Trust Co.

J. Robert Lunney, New York City (Shearman & Sterling, New York City, on the brief), for dependant-appellee First Nat. City Bank of New York.

Before LUMBARD, Chief Judge, and FRIENDLY and SMITH, Circuit Judges.

LUMBARD, Chief Judge.

The trustee in bankruptcy appeals from a dismissal by the district court of his suit to recover money from two banks on the theory that the banks were chargeable with knowledge that misappropriations by the bankrupt corporation's president impaired its capital in violation of New York Stock Corporation Law, McKinney's Consol. Laws, c. 59, § 58.

Giant Outlet Market, Inc. (Giant) operated a farmers' market in Brooklyn, New York, until it burned down in December 1956. Thereafter it received approximately $40,000 on its fire insurance which its president and sole stockholder, Martin Lew, deposited in the corporate account maintained with Bankers Trust Company (Bankers). The corporation had previously filed with Bankers a corporate resolution authorizing Martin Lew to sign and endorse all negotiable instruments and authorizing Bankers to pay them.

Subsequently there occurred three incidents which form the basis for the claims of Giant's trustee in bankruptcy. First, during July 1957 Lew presented to Bankers four

checks drawn by the corporation and signed by himself, totaling $7,439.06, and for a fee of $4.00 received four cashier's checks payable to four individuals, two of them named Lew, to whom the corporation owed nothing. The trustee sued Bankers to recover the $7,439.06 debited to Giant's account.

Second, Lew owed $6,000.00 to First National City Bank of New York (FNCB) for a personal loan. On July 18, 1957 Lew drew and signed a check for $1,045.00 on Giant's account at Bankers and gave it to FNCB as part payment for his personal loan. The back of the check bore Lew's notation that it was to be credited to his account at FNCB. The trustee sued FNBC for the $1,045.00 received by it and Bankers for the $1,045.00 debited to Giant's account, and Bankers cross-claimed against FNCB for any part of the $1,045.00 for which it might be held liable.

Third, on August 8, 1957 Lew drew and cashed a check at Bankers payable to himself for $16,433.30 which closed out Giant's account. He then appropriated the money for his own purposes. The trustee sued Bankers to recover the $16,433.30 debited to Giant's account.

An involuntary petition in bankruptcy was filed against Giant on January 23, 1958 and the corporation was adjudged a bankrupt on February 10, 1958. Creditors have filed claims aggregating $4,443.12 and the time has elapsed for filing any further claims except for the United States which may still file a tax claim for $4,004.51. The trustee in bankruptcy who may sue to set aside transfers of property that are voidable under federal or state law, Bankruptcy Act, § 70, subs. b(4), c, 11 U.S.C.A. 110, subs. a(4), c (1958), brought suit against Martin Lew, Bankers, and FNCB, but was unable to obtain service of process on Lew.

In the district court Judge Zavatt granted summary judgment for Bankers and FNCB. As to the trustee's

first two theories of liability, fraudulent conveyance (Bankruptcy Act, § 67, sub. d, 11 U.S.C.A. § 107, sub. d; New York Debtor & Creditor Law, McKinney's Consol. Laws c. 12, §§ 270-281) and conversion, the judge found that after the first two incidents the corporation was still solvent and that the acts of Lew in making personal use of corporate assets were authorized by the corporation since he was president and sole stockholder. Therefore, he ruled that even if the bank had a duty to inquire it would have found nothing wrong: the acts were authorized and creditors were not harmed. Although after the third incident the corporation was insolvent so that corporate authorization would not save the conveyance from being fraudulent, Judge Zavatt found that Bankers was a holder in due course of the check closing out Giant's account and thus having no knowledge of the transaction's impropriety, is not liable. These rulings the trustee does not challenge.

The trustee's third theory rests on Section 58 of the New York Stock Corporation Law which prohibits a corporation from paying any dividend or making any distribution of assets that would impair its capital.[1] Al-

[1] Section 58 of the New York Stock Corporation Law provides:

"No stock corporation shall declare or pay any dividend which shall impair its capital, nor while its capital is impaired, nor shall any such corporation declare or pay any dividend or make any distribution of assets to any of its stockholders, whether upon a reduction of the number or par value of its shares or of its capital, unless the value of its assets remaining after the payment of such dividend, or after such distribution of assets, as the case may be, shall be at least equal to the aggregate amount of its debts and liabilities, including capital. In case any such dividend shall be paid, or any such distribution of assets made, the directors * * * shall be liable jointly and severally to such corporation and to the creditors thereof to the full amount of any loss sustained by such corporation or by its creditors respectively by reason of such dividend or distribution."

though all three distributions impaired Giant's capital. Judge Zavatt ruled that since the first two incidents did not cause insolvency creditors were not harmed. As to the third transaction he found that Bankers was a holder in due course. With these adverse rulings on his third theory the trustee takes issue.

[1] By statutes such as Section 58 the stockholders are prohibited from withdrawing a certain portion of their initial corporate investment, usually called the stated capital. Without such a provision a corporation could distribute to its stockholders all its assets except those necessary to pay its debts. Since, in such an event, any loss would reduce the corporate assets below what would be necessary to pay all debts, the creditors would bear the full risk of continued operations while any gain would inure to the stockholders' benefit. The stated capital which Section 58 requires the corporation to retain serves as a buffer to absorb losses without impairing the assets necessary to satisfy all creditors. Therefore, the creditors are harmed by each reduction of this buffer, and, contrary to the conclusion of the district court, New York creates a cause of action for impairment of capital regardless of whether that particular distribution caused insolvency. Cottrell v. Albany Card & Paper Mfg. Co., 142 App.Div. 148, 151-52, 126 N.Y.S. 1070, 1073 (1911); Irving Trust Company v. Gunder, 234 App.Div. 252, 254 N.Y.S. 630 (1932). But see Quintal v. Adler, 146 Misc. 300, 262 N.Y.S. 126 (Sup.Ct.), aff'd without opinion, 239 App.Div. 775, 263 N.Y.S. 943 (1933), aff'd without opinion, 264 N.Y. 452, 191 N.E. 509 (1934).

[2, 3] Although Section 58 expressly imposes liability only on the board of directors of the corporation whose capital is impaired, the New York courts have also inter-

preted it to create liability on the part of transferees with knowledge. Ward v. City Trust Co. of N. Y., 192 N.Y. 61, 84 N.E. 585 (1908); see Reif v. Equitable Life Assur. Soc., 268 N.Y. 269, 197 N.E. 278, 100 A.L.R. 55 (1935); Barr & Creelman Mill & Plumbing Supply Co. v. Zoller, 109 F.2d 924 (2 Cir. 1940). The sole question as to FNCB is therefore one of knowledge, and this we will later discuss. Bankers, however, was not a transferee; it received no benefit from the transactions, but acted merely as an agent of Giant to pay money out to others. Even if Bankers had had knowledge, it is not clear that the New York courts would hold it liable. Compare Braem v. Merchants Nat. Bank, 127 N.Y. 508, 28 N.E. 597 (1891); Bartol v. Bennett, 56 N.Y.S. 2d 314 (Sup.Ct. 1945); Carson v. Federal Reserve Bank of N. Y., 254 N.Y. 218, 172 N.E. 475, 70 A.L.R. 435 (1930); Duel v. Brewer, 92 F.2d 59, 112 A.L.R. 1246 (2 Cir. 1937), with Bischoff v. Yorkville Bank, 218 N.Y. 406, 112 N.E. 759, L.R.A.1916F, 1059 (1916); Grace v. Corn Exchange Bank & Trust Co., 287 N.Y. 94, 38 N.E.2d 449, 145 A.L.R. 436 (1941). However, we find that Bankers had no such knowledge that the three transactions impaired capital.

[4] As to the first transaction, the purchase of the cashier's checks, the only circumstances that could have alerted Bankers to Martin Lew's improprieties was the fact that the names of two of the four payees were Lew. However, since Giant's corporate resolution filed with Bankers authorized it to pay without inquiry checks drawn by Martin Lew payable to himself, the fact that he drew checks payable to others named Lew would not require inquiry by Bankers. As to the second transaction, the check payable to FNCB, Bankers was expressly authorized to ignore any notation on a check. Furthermore, even if Bankers knew that Martin Lew was paying a personal debt to FNCB, the resolution permitted it to

pay-checks drawn by Martin Lew in payment of his personal obligations. As to the third transaction, closing out the corporate account, Martin Lew was authorized to draw checks payable to himself. Nothing in the circumstances sufficiently put Bankers on inquiry to require it to ascertain the amount of Giant's liabilities and capital and the value of its assets, and thus to compute whether each transaction impaired capital. For only if Bankers was required to go that far should we charge it with knowledge.

Bankers had 24 hours within which to act on the checks. Its failure to dishonor them within that time would have constituted an acceptance. New York Negotiable Instruments Law, McKinney's Consol. Laws, c. 38, § 225. Cf. id. § 350-b; Regulation J. of the Board of Governors of the Federal Reserve System, 12 C.F.R. 210.5(d). On the other hand, if Bankers had dishonored the checks, it might have been held liable for any damages resulting to the corporate depositor. See Wildenberger v. Ridgewood Nat. Bank, 230 N.Y. 425, 130 N.E. 600 (1930); Wahrman v. Bronx County Trust Co., 246 App. Div. 220, 285 N.Y.S. 312 (1936). Therefore, giving banks so short a time to act on checks, New York does not, consistent with the practical necessities of banking, except a bank, without any more notice than Bankers had in this case, to make an extended investigation before paying a check.

[5] As to FNCB, the only knowledge which it received was that Martin Lew was paying a personal debt with corporate funds. Had FNCB inquired whether such use of corporate property was authorized, both Bankers and Giant would have answered in the affirmative. FNCB had no more obligation than Bankers to survey the assets, liabilities, and capital of Giant and thus to compute whether capital was being impaired.

Ward v. City Trust Co. of New York, 192 N.Y. 61, 84 N.E. 585 (1908), is not to the contrary. There the New York Court of Appeals, in holding liable a bank which received $125,000 in corporate funds for an officer's personal debt, stressed two factors which are absent here. First, the check was for a very large amount, $125,000. Second, the bank had agents on the corporation's board of directors and so had ready means of information about its financial situation. While holding in Bischoff v. Yorkville Bank, 218 N.Y. 106, 112 N.E. 759, L.R.A.1916F, 1059 (1916), and Grace v. Corn Exchange Bank & Trust Co., 287 N.Y. 94, 38 N.E.2d 449, 145 A.L.R. 436 (1941), that the course of numerous dealings over an extended period of time gave knowledge to banks which had received benefits from the appropriated money, the New York Court of Appeals recognized that "to establish joint liability of the bank for the derelictions of the trustee, the plaintiffs must prove that the bank gave to the wrongdoer such assistance as would make the bank a participant in the wrong. Proof that the bank failed in care is insufficient." Grace v. Corn Exchange Bank & Trust Co., 287 N. Y. at 102, 38 N.E.2d at 452 (1941). The facts of this case are much closer to those of Reif v. Equitable Life Assur. Soc., 268 N.Y. 269, 197 N.E. 278, 100 A.L.R. 55 (1935), where the defendant was held to have no notice. See also Newfield v. Oosterhuis, 137 F.2d 437, 440 (2 Cir. 1943); Willcox v. Goess, 92 F.2d 8, 14-16 (2 Cir. 1937); Klachko v. Lawyers Trust Co., 170 Misc. 134, 9 N.Y.S.2d 309, aff'd without opinion, 256 App.Div. 1060, 12 N.Y.S.2d 239 (1939).

Affirmed.

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR BANKERS TRUST COMPANY, RESPONDENT, IN OPPOSITION

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BRIEF FOR BANKERS TRUST COMPANY, RESPONDENT, IN OPPOSITION

Opinions Below

The opinion of the Court of Appeals (Pet. App. 10 *et seq.*) is reported at 296 Fed. 2d 109. The opinion of the District Court is reported at 184 F. Supp. 23.

Jurisdiction

Respondent rests on the statement of jurisdiction contained in the application for a writ.

Question Presented

May a trustee in bankruptcy of a corporation recover from the bank, the respondent Bankers Trust Company (hereinafter called "Bankers"), for moneys paid out by Bankers by checks drawn on the corporate account payable to third parties, and resulting in no benefit to Bankers in the absence of proof that Bankers had knowledge that said payments impaired the capital of the corporation.

Statutes Involved

Section 58 of the New York State Stock Corporation Law is printed in the opinion below of the Circuit Court (Pet. App. 14).

Section 95 of the New York State Negotiable Instruments Law reads as follows:

> "To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith, but the drawing or making of a check or other negotiable instrument by an officer or agent of a corporation against the account of, or in the name of such corporation, to himself as payee, or the endorsement of a check or other negotiable instrument in the name of such corporation, to himself as endorsee, and in either case the cashing

of such check or other negotiable instrument or the deposit thereof to his personal account, and whether such check or other negotiable instrument is drawn against an account standing in the name of such corporation, or in the name of such officer or agent of such corporation as such, shall not be sufficient to put a bank, banker or trust company on inquiry as to the authority of such officer or agent, or impute knowledge of any infirmity or defect in such check or other negotiable instrument, provided such bank, banker or trust company have on file an authorization from said corporation showing that the said officer or agent is authorized on behalf of the corporation to perform any of the above acts for unlimited or limited amounts, and that the amount of the said check or negotiable instrument does not exceed the maximum limits of the amount so contained in the authorization so filed for the said officer or agent when such a limitation is contained therein."

Statement

Except to the extent noted, *infra*, p. 6, the facts upon this appeal are adequately stated in the Circuit Court's opinion (Pet. App. 10-18).*

* The printed opinion contains a typographical error in that the word "except" contained on the 11th line from the bottom of page 17 of the Appendix is erroneous. This word should be "expect".

Argument

This Court has repeatedly stated that in dealing with issues of state law that enter into judgments of federal courts it will hesitate to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable (*Propper v. Clark*, 337 U. S. 472). The application for a writ of certiorari herein should be denied because the judgment of the Circuit Court below is clearly consonant with the decisions and statutes of New York State or the law of any other jurisdiction.

A

Petitioner never claimed in its argument or in the affidavits in this record that respondent Bankers had *actual* notice that the payment of the checks on the corporate account was illegal under Section 58 of the Stock Corporation Law. Rather, petitioner claims that Bankers had *constructive* notice of such illegality; but the only facts to establish such constructive knowledge are the cashing or paying of corporate checks which, at the worst, might be deemed for the benefit of corporate officers. Yet §95 of the New York Negotiable Instruments Law expressly states that knowledge of these very facts, *i.e.*, cashing or paying of checks for the benefit of corporate officers "shall not be sufficient to *put a bank* * * * *on inquiry* as to the authority of such officer or agent, or *impute knowledge* of any infirmity or defect in such check * * * provided such bank * * * have on file * * *" a corporate resolution permitting such acts (italics ours). The corporate resolution on file in the bank is at

least as broad as the language of 95. Therefore 95 expressly negatives that these facts will "impute knowledge" or put Bankers on inquiry to verify whether or not the transactions were legal.

In *Reif v. Equitable Life Assurance Society*, 286 N. Y. 269, 275, the New York State Court of Appeals recognized the immunity conferred on a bank when such a corporate resolution was received by it.

As indicated by the Circuit Court opinion (Pet. App. 14) and the brief of petitioner in the Circuit Court (p. 8) the petitioner did not contest the adverse rulings holding that the payments to others did not result in a claim against Bankers in conversion or fraudulent transfer. Petitioner's sole claim is that the transactions which are set forth in the complaint violate 58 of the New York Stock Corporation Law. The Court of Appeals correctly construed this statestatute and the applicable state law in stating that liability under this section is *expressly* imposed only upon directors of the corporation. Liability under said statute was extended to transferees of corporate property only where the transferee knew that such transfer did impair the capital of the corporation (Pet. App. 15-16).

Petitioner is incorrect in claiming that *Coucia* (Pet. Brief p. 7) held a transferee liable even though without knowledge of a violation of 58. Although the New York State Court of Appeals in *Coucia* wrote no opinion, a reading of the summary of the case prepared by the State Reporter indicates that the action was brought against *directors* for dividends paid *by* them and not *to* them as *transferees*. An examination of the record on appeal in *Coucia* confirms this conclusion. Thus *Coucia* does not impugn the cases cited in the opinion below (Pet. App. 15-16)

to establish that a transferee's liability under §58 requires proof of knowledge by the transferee of the impairment of capital.

It is submitted that the Supreme Court should not interfere with the judgment of the court below that nothing "in the circumstances sufficiently put Bankers on inquiry to require it to ascertain the amount of Giant's (Corporation's) liabilities and capital and the value of its assets, and thus to compute whether each transaction impaired capital" (Pet. App. 17).

B

Since Bankers was not a transferee of these funds and received no benefit from same, even if Bankers had had knowledge that the payments would impair capital under Section 58, the New York cases establish that Bankers would not be liable herein (Pet. App. 16). *Bischoff* and *Grace*, cited by the opinion below as indicating a doubt upon such holding, actually involved cases of transferees of misappropriated assets (as distinguished from a defendant that is not a transferee).

C

The dismissal of the petitioner's action was based upon a motion by Bankers for summary judgment. The courts below presumably assumed a violation of §58 in order to definitively dispose of plaintiff's claim. However, none of the *prima facie* facts of a claim under Section 58 of the Stock Corporation Law is contained or even mentioned in petitioner's opposing affidavits. Therefore, Bankers would be entitled to summary judgment dismissing petitioner's claim (*Engel v. Aetna Life*, 139 Fed. 2d 469 (C. C. A. 2d 1943); *Lindsey v. Leary*, 149 Fed. 2d 899 (C. C. A. 9th)).

Conclusion

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Office Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 779.

CARL M. FIELD, as Trustee in Bankruptcy in the Estate of Giant Outlet Market, Inc., Bankrupt,

Petitioner,

v.

BANKERS TRUST COMPANY and THE FIRST NATIONAL CITY BANK OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR FIRST NATIONAL CITY BANK IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI.

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Opinions Below.

The unanimous opinion of the Court of Appeals (Petitioner's Appendix, pp. 10-18) is reported at 296 F. 2d 169 (C. A. 2). The judgment of the Court of Appeals was entered on November 8, 1961. A petition for rehearing and a petition for rehearing *in banc* were both denied by the Court of Appeals on December 7, 1961. The district court's opinion is reported at 184 F. Supp. 23 (E. D. N. Y.).

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Question Presented.

When a payment is made out of corporate funds and is used to pay a corporate officer's personal debt to a bank, does not the fact that such payment was made with the authorization of the corporation and when the corporation was solvent, defeat any recovery from the bank by the trustee in bankruptcy of the corporation, even though such payment impaired the corporation's capital, but without the knowledge of the bank?

Statutes Involved.

The essential part of Section 58 of the New York Stock Corporation Law is set forth in the margin of the Court of Appeals opinion (Petitioner's appendix, p. 18).

Section 95 of the New York Negotiable Instruments Law is set forth in the brief of respondent Bankers Trust Company (p. 2).

Statement.

The statement of facts as set forth in the opinion of the Court of Appeals (Petitioner's appendix, pp. 10-18) is not controverted by the parties.

Argument.

Giant Outlet Market, Inc. (Giant) filed a corporate resolution with Bankers Trust Company (Bankers) which

authorized its president Martin Lew (Lew) to sign and endorse all negotiable instruments and authorized Bankers to pay them. This resolution permitted Bankers to pay checks drawn by Lew in payment of his personal obligations.

Paying Lew's personal debts out of Giant's account was not sufficient to put Bankers on inquiry as to Lew's authority or impute knowledge to Bankers of any infirmity or defect in such payments, once the resolution was filed. Section 95, New York Negotiable Instrument Law.

Lew owed $6,000 to First National City Bank (FNCB) for a personal loan (which had been used to finance Giant). On July 18, 1957 Lew drew and signed a check for $1,945 on Giant's account at Bankers and gave it to FNCB as the final payment for his loan. Although the trustee did not show that this distribution of assets impaired the capital of Giant, the courts below assumed that capital was impaired. In any event, this distribution did not cause insolvency of Giant.

Section 58 of the New York Stock Corporation Law expressly imposes liability on the directors of a corporation whose capital is impaired and the New York courts have also interpreted it to create liability on the part of transferees with knowledge of such impairment. Therefore the sole question as to FNCB is one of knowledge.

The only knowledge which FNCB received as to payment was that Lew was paying a debt with corporate funds. Inquiry by FNCB, if directed to either Bankers or Giant would have shown that Lew had authority to issue the check. Even if it be assumed that FNCB should have made further inquiry, it, nevertheless is entitled to the benefit of anything further inquiry would have disclosed. "Every fact that reasonable inquiry would have made known would have countenanced an honest belief that

the checks were issued without abuse of authority." *Reif v. Equitable Life Assurance Society*, 268 N. Y. 269 (1935).

Nothing in the circumstances put FNCB on inquiry to ascertain the amount of Giant's liabilities and capital and the value of its assets, and thus enable it to determine whether this payment impaired capital.

Petitioner has cited three cases* for the proposition that a trustee may recover from the payee a payment by an officer which reduces the corporation's capital, even where no insolvency resulted from such payment. This proposition of law has no application, however, to the facts of the present case. For each of the three actions was brought against a sole stockholder or against directors for dividends paid by them. The cases in no way support the proposition that corporate payments may be recovered from an innocent transferee who had no knowledge of the impairment of capital.

The case of *Grace v. Corn Exchange Bank*, 287 N. Y. 94 (1941), makes it plain that a bank's liability can only be predicated upon participation in a wrongful conversion. The Court said:

> "To establish joint liability of the bank for the dereliction of the trustee, the plaintiff must prove that the bank gave to the wrongdoer such assistance as would make the bank a participant in the wrong. Proof that the bank failed in care is insufficient."

The payment to FNCB was fully authorized and ratified by Giant and its sole stockholder; there was no participation by FNCB in any "wrong"; FNCB had no knowledge of any impairment of capital; and Giant was solvent at

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* *Cottrell v. Albany Card & Paper Mfg. Co.*, 142 App. Div. 118 (3d Dept. 1911); *Irving Trust Co. v. Gaudet*, 234 App. Div. 252 (1st Dept. 1932); and *Cowin v. Jonas, et al.*, 293 N. Y. 838 (1944).

the time of the payment. The Court of Appeals decision in denying recovery to the trustee is completely in accord with applicable state law.

Conclusion.

The decision below is correct and there is no conflict of decisions. It is therefore respectfully submitted that the petition for a writ of certiorari be denied.

New York, N. Y., April 4, 1962

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